

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



ORIGINAL

75-5019

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**United States Court of Appeals**

For the Second Circuit.

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In the Matter of

CARTRIDGE TELEVISION, INC.,

Debtor-Appellee,

EDDIE L. THOMPSON, JR., ROBERT KELLER, EDWARD A.  
NEFF, SUE MANCINI, DAVID D. ACKERMAN, BILL  
COPSES, BILL DIANGIKES, JOHN F. MAGDA, JR., J.  
HIRAM JOHNSON and DEAN ELLISON,

Appellants.

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**Appellants' Brief**

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UNITED STATES COURT OF APPEALS  
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In the matter of

CARTRIDGE TELEVISION, INC.

Debtor-- Appellee

EDDIE L. THOMPSON, JR., ROBERT KELLER, EDWARD  
A. NEFF, SUE MANCINI, DAVID D. ACKERMAN, BILL  
COPSES, BILL DIANGIKES, JOHN F. MAGDA, JR.,  
J. HIRAM JOHNSON and DEAN ELLISON

Docket No.  
75-5019

Appellants

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APPELLANTS' BRIEF

This is an appeal from a determination of the United States District Court for the Southern District of New York, (Duffy, J.) which affirmed, without opinion, a determination of Bankruptcy Judge Herzog expunging claims 533 and 534. The appellants submit that the determinations below were not proper and should be reversed by this Court.

STATEMENT OF THE CASE

The determinations below are erroneous for the following reasons:

1. While a Bankruptcy Judge has discretion under Section 57(d) of the Bankruptcy Act to expunge claims if they would unduly delay the administration of the Estate the exercise of such discretion is an abuse of discretion where a corporate bankrupt is involved. This is so because, with an individual, a claim which is not provable is not dischargeable and conceivably

could be brought against the individual after his discharge in Bankruptcy. However, with a corporate debtor a claim not provable in a Bankruptcy is gone forever.

2. If a Bankruptcy Judge is given unlimited discretion under Section 57(d) of the Bankruptcy Act to refuse to allow a claim if it will unduly delay the administration of an Estate where a corporate debtor is involved, then Section 57(d) of the Bankruptcy Act is unconstitutional and in violation of the "due process" clause of the Fifth Amendment to the Constitution of the United States.

3. The Bankruptcy Judge's ruling that a "Class Claim" cannot be made in a Bankruptcy Proceeding is totally erroneous.

#### FACTS

Appellants herein filed Claims 533 and 534 as "Class Claims" in their own behalf and in behalf of a Class of "defrauded stockholders" of Cartridge Television, Inc. Claim 533 was based on fraud and violations of the Securities Acts by reason of the issuance of the prospectus with respect to the stock involved which was purchased by the public. Claim 534 was based upon Securities Fraud (principally based on Section 10(b) of the Securities Act) with respect to purchasers of these securities after the issuance of the prospectus.

The Bankruptcy Judge held that, as a matter of law, Class Claims could not be interposed in a Bankruptcy Proceeding.

He further held that these claims, as individual claims, would not be allowed since they would unduly delay the administration of the Bankrupt's Estate.

POINT ONE

WHILE A BANKRUPTCY JUDGE HAS DISCRETION UNDER SECTION 57(d) OF THE BANKRUPTCY ACT TO EXPUNGE CLAIMS IF THEY WOULD UNDULY DELAY THE ADMINISTRATION OF THE ESTATE THE EXERCISE OF SUCH DISCRETION IS AN ABUSE OF DISCRETION WHERE A CORPORATE BANKRUPT IS INVOLVED.

Section 57(d) of the Bankruptcy Act provides that a Bankruptcy Judge has discretion to disallow an unliquidated claim:

" \* \* \* if the liquidation or estimation would unduly delay the administration of the Estate or any proceeding under this Act \* \* \*"

Where a Bankruptcy Judge exercises such power the claim, which is not allowed, is then not dischargeable and can be asserted against the Bankrupt after his discharge.

Section 57(d) was basically designed for individual bankruptcies or in corporate re-organization proceedings where the Bankruptcy of the Corporation would not stop the survival of the corporation as a viable entity. It has no application to a situation, such as is involved in the instant case, where the corporation is an adjudicated bankrupt and all of its assets are being liquidated.

The application by the Bankruptcy Judge of his discretion under Section 57(d) of the Bankruptcy Act in the instant case is an abuse of discretion. This is so because,

if the claims involved herein are not allowed, they can never be asserted against the debtor. The debtor is an adjudicated bankrupt, will not be re-organized, and, after distribution of the assets to its creditors will become a mere corporate shell. Thus, in the present case, the Bankruptcy Judge has, in effect, held that a "defrauded stockholder" can never obtain a part of a debtor's Estate since, in all cases, the "fraud" must be proved and will, in all cases, "unduly delay the administration of the Estate".

Claims 533 and 534 amount to vastly more in amount than all of the other claims asserted in this bankruptcy. Thus a disallowance of the major claim by the Bankruptcy Judge, even aside from the fact that a worthless corporate debtor is involved would be an abuse of discretion. The Court of Appeals in In Re William Rakestraw Co., 450 Fed(2nd) 6(9) in reversing a determination of a Bankruptcy Judge who disallowed a claim upon the alleged ground that it would unduly delay the administration of the Estate had this to say:

" \* \* \* Nor is the Referee's ground valid that settlement of Marin's claim will unduly prolong the administration of the Estate. While it is acknowledged that the majority of creditors should not be made to await the settlement of a single claim Marin's Claim comprises nearly 20% of the scheduled claims against the bankrupt and is the largest single claim against the Estate. The Referee's discretion in this matter should be exercised "in a generous liberal way" (emphasis supplied).

Compare the situation in the case at bar where the Claims expunged amount to more than all claims by others filed against this Estate.

Thus, the Claims should not have been expunged and the Referee has abused his discretion in this case.

POINT TWO

IF A BANKRUPTCY JUDGE IS GIVEN UNLIMITED DISCRETION UNDER THE FACTS INVOLVED IN THE CASE AT BAR THEN SECTION 57(d) OF THE BANKRUPTCY ACT IS UNCONSTITUTIONAL AS VIOLATIVE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

If this Court should hold that Section 57(d) of the Bankruptcy Act would give a Bankruptcy Judge unlimited discretion to expunge claims whenever they would "unduly delay the administration of the Estate" without regard to all factors involved then Section 57(d) of the Bankruptcy Act would be unconstitutional as constituting a violation of the "due process" clause of the Fifth Amendment. This would be so since it would be impossible for a "defrauded stockholder" to ever obtain recompense from a corporate bankrupt if the corporation became adjudicated a bankrupt. This is, of course, a totally impossible result. It would mean that a Bankruptcy Judge could violate the Fifth Amendment with impunity by merely disallowing a claim which would take what he felt was "an undue time" to adjudicate. This result would leave the claimant with no redress and would constitute a taking of his property without "due process of law".

Fifth Amendment strictures are applicable to  
Bankruptcy proceedings. See, for example, Ginsberg vs.  
Lindell, 107 Fed (2nd) 721 where the Court said:

" \* \* \* Congress, in the exercise  
of the bankruptcy power, is bound  
by this principle (Fifth Amendment  
'due process' restrictions) and may  
not take a property right from one  
creditor and transfer it without  
compensation to another without  
violating the Fifth Amendment"

To the same effect is Louisville Joint Stock  
Land Bank vs. Radford, 295 US 555; In Re Caffall Oil Corporation  
22 Fed. Supp. 484; In Re Maynard, 15 Fed. Supp. 787 and In Re  
Penn Central Transportation Company, 494 Fed(2nd) 270

#### POINT THREE

#### CLASS CLAIMS ARE PROPER IN A BANKRUPTCY PROCEEDING

The Bankruptcy Judge further rejected the Claims,  
insofar as they purported to be Class Claims, upon the alleged  
ground that Class Claims are not permitted in a Bankruptcy  
Proceeding and Rule 23 of the Federal Rules of Civil Procedure  
is not applicable thereto. In that, he was in error. Bankruptcy  
Rule 723 provides in part that :

"\* \* \* Rule 23 of the Federal Rules  
of Civil Procedure applies in  
adversary proceedings.\* \* \*"

Furthermore there have been repeated applications  
of Rule 23 where fraud claims of defrauded stockholders are  
involved. See, for example, In Re Four Seasons Nursing Centers

Inc. (CCH Bankruptcy Law Reporter 1973-1975 transfer binder par. 64,976) and the more recent action taken by the United States District Court for the Central District of California in the Equity Funding Bankruptcy.

CONCLUSION

THE DETERMINATION OF THE DISTRICT COURT SHOULD BE  
IN ALL RESPECTS REVERSED AND THE CLAIMS EXPUNGED ALLOWED.

Respectfully submitted

BADER and BADER  
Attorneys for Appellants

BADER AND BADER Cartridge TV v. Thompson, Jr. etc.

STATE OF NEW YORK )  
: SS.  
COUNTY OF NEW YORK )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 13 day of Jan. 1976 deponent served the within Brief upon:

Otterbourg, Steindler, Houston & Rosen, Esqs.

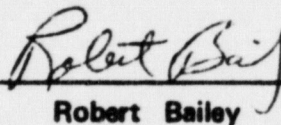
attorney(s) for

Appellee

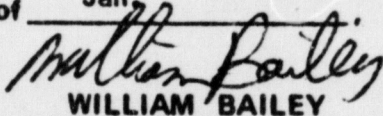
in this action, at

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the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

  
Robert Bailey

Sworn to before me, this 13  
day of Jan. 1976.

  
WILLIAM BAILEY

Notary Public, State of New York  
No. 43-0132945  
Qualified in Richmond County  
Commission Expires March 30, 1976